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OF THE

LAW COMMITTEE

OF THE

BOARD OF REGENTS

ON THE

ACT OF CONGRESS OF JULY 2, 1862.

SACRAMENTO:

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MR. PRESIDENT: An inquiry has been made of the Law Committee as to whether in their opinion the funds derived to the University under the Act of Congress of July 2, 1862, may now be lawfully invested in securities other than the stocks of the United States, or of the States, or some other stocks supposed to be reliable, and yielding not less than five per cent upon their par value, as prescribed in that Act.

At the time of its passage the money markets of the country were overflowing with securities of the character therein mentioned, and no material financial change would seem to have been then anticipated.

But now it is understood to be the case that there are not to be found in the money market any, or, at all events, a sufficient amount of stocks of the prescribed character in which the funds of the University may be invested so as to produce the yield required by the Act. There are certainly no United States securities of such a character to be obtained, and in California there are practically no such State securities outstanding, or, at all events, but a very small amount of such securities; and the Finance Committee are unable to obtain the securities required by the Act of Congress upon the terms it has prescribed. In the meantime a considerable portion of the funds of the University have been awaiting a proper investment, and in a comparatively

short time the greater portion of the entire donation must be in a like situation, and no investment of it can be legally made if the provisions of the Act of 1862 as originally enacted are to be adhered to on the part of the State authorities.

In view of this condition of things, it would appear that on the third of March last the Congress of the United States, by an Act approved on that day, proposed to those States of the Union not having the outstanding securities contemplated by the Act of July 2, 1862, a new scheme of investment of these funds, by which proposal such investments were no longer to be confined to the class of securities theretofore prescribed, but might be made "in any other manner" deemed advisable by the authorities of the State acceding to the proposed change. Some four days after the passage of the Act of Congress last referred to, to wit: on the seventh of March last, the State of California, by an Act approved on that day, virtually accepted the proposal of Congress in that behalf, and, were it not for a difficulty now to be suggested, the Committee would have little hesitation in giving an affirmative response to the inquiry submitted to its consideration.

As early as March 30, 1868, the State of California, by a concurrent resolution of its legislative houses, had memorialized the Federal Government on this subject, had pointed out that the Act of July 2, 1862, did not permit means of investment permanent in their character, or reliable for long periods of time, and had requested her representatives and instructed her Senators to obtain the passage of an Act of Congress conferring upon the State the unconditional right, in its

discretion, to invest this fund "in unincumbered productive real estate." But this proposal by the State seems not to have been favorably regarded at Washington, and the measure failed of success.

The Act of Congress of the third of March last, proposing a change in the terms of the Act of July 2, 1862, in respect to investments, was acccompanied by a condition therein expressed, by which any accepting State should engage that the funds to be invested should yield not less than five per centum per annum upon the amount of the investment; in other words, that the State assenting to the change should undertake upon its part to become a surety or guarantor against any loss to the fund which might otherwise be sustained by reason of the new method of investment proposed; and the Committee are of opinion that the Act of the Legislature of this State of the seventh of March last, already referred to, fairly imports upon its face an assumption by the State of the obligation of suretyship required by the Act of Congress, so far as the State can be considered under the provisions of the present Constitution to have been at liberty to assume an obligation of that character.

We are thus brought to the consideration of the question whether, under the provisions of the present Constitution, adopted in the year eighteen hundred and seventy-nine, it is competent for the State to assume such an obligation.

By the thirty-first section of the fourth article of that instrument it is provided as follows:

"Section 31. The Legislature shall have no power "to give or to lend, or to authorize the giving or lend-

"ing of the credit of the State in aid of, or to any per-
"son, association, or corporation, whether municipal or
"otherwise, or to pledge the credit thereof in any man-
"ner whatever, for the payment of the liabilities of any
"individual, association, municipal, or other corporation,
"whatever," etc.

This general provision is in terms restrained in its operation by a *proviso* referring to the support of orphans, abandoned children, and aged persons in indigent circumstances, under the provisions of the twenty-second section of the same article, but does not appear to be otherwise restrained or modified.

Again; section thirteen, of article twelve, of the same instrument, is as follows:

"The State shall not in any manner loan its credit," etc. And this proviso does not seem on its face to be qualified or restrained at all, though doubtless it is by implication qualified by the provisions of the twenty-second section of article four in relation to orphans, etc., already referred to.

The only remaining clause of the present Constitution which, in the opinion of the Committee, may be supposed to bear upon the question, is found in the ninth section of the ninth article of that instrument, and which for convenience of reference is here inserted in extenso:

"Section 9. The University of California shall con-
"stitute a public trust, and its organization and govern-
"ment shall be perpetually continued in the form and
"character prescribed by the organic Act creating the
"same, passed March third, eighteen hundred and sixty-

"eight (and the several Acts amendatory thereof), sub-
"ject only to such legislative control as may be neces-
"sary to insure compliance with the terms of its endow-
"ments, and the proper investment and security of its
"funds. It shall be entirely independent of all politi-
"cal or sectarian influence, and kept free therefrom in
"the appointment of its Regents, and in the adminis-
"tration of its affairs; *provided*, that all the moneys
"derived from the sale of the public lands donated to
"this State by Act of Congress, approved July second,
"eighteen hundred and sixty-two (and the several Acts
"amendatory thereof), shall be invested *as provided by*
"*said Acts of Congress*, and the interest of said moneys
"shall be inviolably appropriated to the endowment,
"support, and maintenanee of at least one college of
"agriculture, where the leading objects shall be (with-
"out excluding other scientific and classical studies,
"and including military tactics), to teach such branches
"of learning as are related to scientific and practical
"agriculture and the mechanic arts, in accordance with
"the requirements and conditions of said Acts of Con-
"gress; and the Legislature shall provide that if,
"through neglect, misappropriation, or any other con-
"tingency, any portion of the funds so set apart shall
"be diminished or lost, the State shall replace such por-
"tion so lost or misappropriated, so that the principal
"thereof shall remain forever undiminished. No per-
"son shall be debarred admission to any of the colle-
"giate departments of the University on account of
"sex."

For a reason hereafter stated the Committee do not propose to attempt, in this report, to construe these

several provisions of the Constitution with reference to each other, or to ascertain their true meaning and effect when read together, but will content itself with submitting to the Board such suggestions as appear to it, upon such examination as it has been able to bestow, to be pertinent to the question in hand.

Is the assumption by the State of an obligation to make good any losses which may accrue under the new method of investment proposed—loaning the "credit" of the State—within the prohibition of the thirteenth section of the twelfth article of the Constitution: "The State shall not in any manner loan its credit"?

Has not the Federal Government proposed in the amendatory Act to enlarge the methods of investment, because it is content to rely upon the "credit" of the State pledged to make good any loss that may accrue by the new character of investment proposed? And, except for the supposed "credit" of the State and the confidence of the Federal Government reposed therein, would that government have probably given its assent to the new scheme of investment?

Regarding the obligation demanded by the Federal Government, and attempted to be assumed by the State, as a contract of *guaranty* or *suretyship*, is not such a contract necessarily based upon the "credit," real or supposed, of the surety or guarantor?

Is it possible to estimate the value of a contract of guaranty or suretyship except on the "credit" of the supposed guarantor or surety?

It may be suggested, upon the other hand, that the University of California is to be regarded as a portion

of the State government, so that any obligation assumed by the State in connection therewith would not take on the character of a loan of its credit, since such obligation would not in that view concern any other debt than the debt of the State itself, and that a State could not be said to loan its credit when it only bound itself to pay its own debt. Is the University or its fund to be guaranteed, in this sense, a part of the State government? Is the identity of the State government affected by the circumstances of its fostering or not fostering a State University?

Again: to whom does the State by this assumption place itself under the obligation supposed to be founded upon the loan of its credit? Does that obligation run to the State itself? On the contrary, does it not run directly to the Federal Government to whom the promise is in fact made?

Who, as promisee in this obligation, would have the right to complain of its breach except the Federal Government whose donation had thereby become impaired or lost? It may be suggested with much plausibility that we have here a promisor, the State, and a promisee, the Federal Government, and a contract by which the State pledges its "credit" to make good any future losses sustained in the management of a designated fund to be employed for a particular purpose.

Turning again to the ninth clause of the ninth article, which is devoted to the University of California, let us see what provision is found there which can be fairly supposed to bear upon this question.

That section begins by placing the organization and government of the University, as prescribed by the Act

of March 23, 1868, and the Acts amendatory thereof, substantially beyond legislative control, and reserves to the Legislature only the power to enact such laws as may be necessary to insure compliance with the terms of the endowments, and the proper investment and security of the funds. By this provision the independence of the University, except in the respect indicated is practically established.

Does the reservation of the legislative power to pass such laws as may insure compliance with the terms of the endowments and the prior investment and security of the funds, carry with it by fair implication a power to loan the credit of the State in connection therewith? If some person were now to propose to loan to the University of California, whose independent government and organization has thus been, in a measure, established, a sum of money to be used by it to further its objects and purposes, upon condition that the State should become a surety or guarantor against the loss of such funds, or for their return after a limited time, would not such a proposition amount to a proposal that the State should *loan its credit?* Again, as bearing somewhat upon the intention of the framers of the Constitution, as expressed in the ninth section of the ninth article, it would seem that, as in the enactment of the Act of Congress of July 2d, 1862, already referred to, the possibility of a change in the terms of that Act becoming necessary was not foreseen or contemplated, because it is in the said ninth section expressly "*provided* that all the moneys derived from the sale of the "public lands donated to this State by the Act of Con"gress approved July 2d, 1862, (and the several Acts

"amendatory thereof,) *shall be* invested *as provided by* "*said Acts of Congress,*" etc.

And it might be suggested that so far from there being manifested a purpose, on the part of the framers of the Constitution, that the State might loan its credit, in connection with any change that might be thereafter proposed and accepted, in the terms of the Act of Congress of July 2d, 1862, the provision is that that Act shall not be altered *at all.*

Without attempting to pursue the subject further, or to express an opinion as to what should be the construction of the Constitution in the case in hand, the Committee submit these suggestions, to show that the question cannot be said to be entirely free from difficulty.

The consequences to the University of a possible misconstruction are too serious to be risked. If the funds of the University cannot be loaned at all, the income expected therefrom must cease. On the other hand, if, in an attempt to derive an income, investments should be made not authorized by law, the loss to the University of the principal sum so invested is possible. Either consequence would be of such an unfortunate character that the Committee are of opinion that for the present no investment can be made with reasonable safety, except such investment pursue the terms of the Act of July 2, 1862, as originally enacted, and that before investments shall be made in any other manner than the manner prescribed in that Act, an authoritative construction of the Constitution upon the points suggested should be obtained from the Supreme Court of the State. In the judgment of the Committee, no

other construction than one supported by the official authority of that tribunal can be relied upon with safety. For, in the opinion of the Committee, so many considerations of greater or less force and plausibility may be fairly brought in support of either of these adverse views as to the true interpretation of the Constitution, that it will require the judgment of the Court to set the question at rest.

The Committee therefore report the following resolution for the consideration of the Board of Regents:

Resolved, That the attorney of the Board be and he is hereby directed and instructed to make a case for the purpose of bringing before the Supreme Court of the State, in a proper manner for decision, the question whether, under the operation of the legislation of Congress and of this State in connection with the provisions of the present Constitution of this State, the Board of Regents of this State may lawfully invest that portion of the funds of the University derived to it under the Act of Congress of July 2, 1862, in securities other than those prescribed in the said Act of July 2, 1862, as originally enacted.

WALLACE, Chairman.